In the

Supreme Court of the United States

October Term, 1973

No. 73-1583

PROVISION HOUSE WORKERS' UNION LOCAL 274, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

URBAN PATMAN, INC.,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Intervenor Urban Patman, Inc. in Opposition.

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IN THE

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PROVISION HOUSE WORKERS UNION LOCAL 274, AFL-CIO,

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NATIONAL LABOR RELATIONS BOARD,

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Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 3) is reported at 493 F. 2d 1249. The Board's decision and order is reported at 197 NLRB No. 158 (Pet. App. 4-7).

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 9, 1974. The petition for a writ of certiorari was filed on April 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The overriding issue here involved relates to whether the National Labor Relations Board may, consonant with its proper exercise of discretion, initially defer to the parties' consensual processes and thereby promote a well-settled labor policy in favor of arbitration. Petitioner seeks to unduly shackle the Board via its averments that the Board is *required* to exercise its immediate jurisdiction in every case which involves not only an alleged unfair labor practice but also an arbitrable contract dispute.

Specifically, the questions presented for review by this Court are:

1. Does substantial evidence support the court of appeals' determination that the National Labor Relations Board did not abuse its discretion in requiring the parties to settle their contractual disputes in an arbitral forum which they have consensually established, subject to the Board's subsequent review to determine whether the settlement was consistent with the policies of the National Labor Relations Act?

2. Does the Board have the discretion to require the parties to settle their contractual disputes in an arbitral forum which they have consensually established, subject to the Board's subsequent review to determine whether the settlement was consistent with the policies of the National Labor Relations Act?

Statement of the Case.

Intervenor and Real Party in Interest Urban N. Patman, Inc. (hereinafter referred to as "Patman") is a member of a multi-employer bargaining association known as Associated Meat Jobbers of Southern California (hereinafter referred to as "Meat Jobbers"). The Meat Jobbers and Petitioner have for many years negotiated collective bargaining agreements for employers and employees engaged in the fresh meat business of processing beef, lamb and pork into uncooked steaks, hamburgers, chops, and roasts (Trial Examiner's Decision, 3:4-10).

In past years, Patman's principal business was the processing of pork and some beef into sausage, bacon, ham, hot dogs, and corned beef. Petitioner represented Patman's employees engaged in this business, but it did not negotiate an agreement covering them with the Meat Jobbers or with Patman. Rather, it negotiated an agreement covering said employees with a group of independent sausage industry employers known as Independent Sausage Kitchens, who had a bargaining agent not representing Patman and other than the Meat Jobbers. Members of the Meat Jobbers who have sausage operations and who are not represented by the agent of the Independent Sausage Kitchens have normally authorized Meat Jobbers to adopt Petitioner's independent sausage industry agreement on their behalf. The Independent Sausage Kitchens' contracts for the years 1967 to 1973 covered employees classified under the following departments: sausage department,

pork processing department, lard department, and fresh meat and shipping [G.C. Exs. #7 and #2; Trial Examiner's Decision, 3:15-30].

In 1968 after Patman had unilaterally researched the market potential for precooked foods, it initiated a precooked foods department on a small scale (two employees and a single boiler). Said department was started on a trial basis only to determine the feasibility of entering the precooked foods market [Tr. 181: 2-5].

Because of the nascent and embryonic nature of the precooked food operations, no meaningful bilateral establishment of job definitions and rates could be achieved by negotiations. Thus, until the time when the operations were sufficiently solidified to permit the establishment of negotiated permanent rates and employment conditions, Patman was compelled to find, unilaterally, some temporary basis for establishing compensation rates for the employees in the precooked foods department [Tr. 182:16 to 184:3].

It was clear that the new and experimental precooked foods operations and procedures were materially different and distinct from the prior operations engaged in by Patman [Tr. 184:2-15; 219:15-16, 18-19; 220:1]. Patman was progressing from a partially automated and fully manual sausage, boning and corning operation, and venturing into a wholly automated precooked foods operation. The operations were further distinguished by the differences in resultant end products, and by the lesser skills [Tr. 183:9; 182:25], physical effort [Tr. 185:1-8], and absence of specific functions which earmarked the precooked foods operation [Tr. 201:7-14; 205:10-23; 206:14-25; 207:11-12; 208:19 to 209:3; 184:9-15].

Because the precooked foods operation involved cooking functions, it was more akin to the sausage operations than to the carving and sale of raw beef. Accordingly, Patman generally applied the sausage industry agreement to the precooked foods employees. As to wages, Patman unilaterally paid to the precooked foods employees the rates prescribed in the sausage industry agreement for those jobs thereunder which were most analogous to the functions in the precooked foods operation. For jobs in the precooked foods department that had no equivalent in the sausage department, such as quality control inspection and packing and boxing of precooked foods, rates were unilaterally set by Patman by assigning bracket numbers to those jobs and paying the rate for such bracket as was listed in the sausage contract [Tr. 200:2 to 209:1].

During 1969 and 1970, while Patman's sausage business declined, the precooked foods operation progressively increased. By 1971, approximately only 13 employees worked in the sausage department. On the other hand, the precooked foods department had expanded (from 20 employees in 1968) to a point where, at peak in 1971, 44 employees worked there. At a substantial cost, Patman installed in the precooked foods department a mechanical system with an increased capacity [Tr. 175:6 to 176:2; 181:5 to 182:14].

It soon became apparent that the precooked foods department was developing out of its experimental stage and was proving to be potentially the sole affirmative source of Patman's survival. Accordingly, it became essential for Patman to establish mutually agreeable contract rates on a permanent basis, rather

than seek to survive on experimental rates which were becoming increasingly unsatisfactory, and which carried the continuing risk that because of their prolonged maintenance, they might be considered something more than temporary by the Union. Further, because Patman's competitors in the precooked food business were able to underbid it due to their lower wage rates, it became increasingly essential to negotiate new and more competitive rates [Tr. 103:19 to 104:4; 285:20-25].

During negotiations in August, September and October of 1970 between Petitioner and the Meat Jobbers for a new meat cutters' contract, Patman's attorney, aware of the lower wage rates paid by Patman's precooked foods competitors, requested the Petitioner's representatives to consider and negotiate separate rates for the employees in the precooked foods department. He was told, however, that because there were more important items on the bargaining table, there would be no discussion of that matter either now or in the future [Tr. 286:1-14].

Petitioner and the Independent Sausage Kitchens reached agreement on a new contract in November 1970, and Petitioner's membership, which included employees of Patman, ratified the agreement on November 28, 1970 [G.C. Ex. #2; Tr. 50:4-8].

Because Petitioner would not agree to bargain concerning the coverage and treatment of the precooked foods employees, it was incumbent upon Patman to either maintain the preexisting practice of paying wages and benefits comparable to the sausage industry agreement, or to initiate a wholly new schedule of wages, rates and benefits. For lack of a better choice and to avoid potential further strife with Petitioner, Patman

judiciously decided to follow generally the rates, wages and benefits prescribed in the 1970 sausage industry agreement and to apply where possible said provisions to the precooked foods operation. Patman followed this course notwithstanding that at the time it was neither a party to nor bound by the 1970 agreement. Additionally, in applying these equivalency rates, Patman never intended to agree to establish these rates as binding contract rates [Tr. 183:20 to 184:3; 197:13-14].

Patman persisted in seeking to have Petitioner meet with it to arrive at a mutually-established meaningful compensation package covering the new and mushrooming operation. During November 1970, Mr. Urban Patman (the President of Patman) telephoned a representative of Petitioner and told him he had a tremendous problem and wished to discuss it. The representative told Mr. Patman he would get in touch with him. When he did not do so, Mr. Patman unsuccessfully attempted on five occasions to reach him (Trial Examiner's Decision, 5:9-17).

Later, at two informal meetings between Mr. Patman and the Petitioner's representatives, Mr. Patman unequivocally informed said representatives that because of the glaringly lower wages and rates paid by Patman's precooked foods competitors, it was economically impossible for Patman to exist commercially on the temporary rates then applicable to its precooked employees. Mr. Patman further informed said representatives that the $500,000 in new equipment for the precooked foods operations would have to stay idle unless he could get a formal and permanent contract equal to that of his competitors. One representative said he sympathized with Mr. Patman, but that he had no authority to alter

the sausage industry agreement [Tr. 104:5-6]. He concluded that he would contact Mr. Patman later concerning a meeting [Tr. 42:22 to 44:16; 56:14-19; 144:9 to 145:16; 44:9-25; 103:19 to 104:12].

In the interim, Patman determined that it could not compete successfully with the aforementioned competitors while paying the temporary standard sausage contract rates. With this in mind, he contacted Patman's counsel and requested him to renew once again the negotiations with Petitioner for a permanent contract covering the precooked foods employees [Tr. 341: 11-17; 287:7-11].

At various subsequent meetings between Patman's counsel and Petitioner's representatives, the parties could not agree as to the terms and coverage of the new proposed contract [Tr. 22:2 to 26:2; 105:1 to 106:13].

At a later meeting on May 8, 1970, Petitioner's representative gave Patman's attorney, as requested, copies of contracts which the Petitioner's International Union had negotiated with Patman's precooked foods competitors. Patman's attorney said he would like to study them to make a comparative analysis, that he would meet with Patman the next day, and that it was necessary that the matter be resolved quickly because Patman had to submit a work bid by June 4, 1970. Petitioner and Patman agreed to resume their meeting on June 2, 1970 [Tr. 26:12-18; 106:13-17].

Patman has an annual layoff in June. Even earlier than June, however, production had fallen off in the precooked foods department to a point where it was necessary to lay off the second and third shift employees. The first shift employees were laid off at the end of the day on Friday, May 28. Between that date and

June 2, Petitioner notified the laid-off employees on each of the shifts, 44 in number, that there would be a meeting on the night of June 2 [Tr. 17:10-28].

During the day of June 2, Patman's attorney met with Petitioner's representatives and presented a proposed permanent agreement based on rates and fringe benefits contained in the agreements of competitors. That proposal was developed as follows: Patman's counsel prepared a comparison chart showing the wages and fringe benefits contained in each of the competitive contracts, and reviewed said comparison with Mr. Patman [Tr. 294-295]. After lengthy discussions, a determination was made of the nature and level of wages and benefits which Patman could provide on a competitive basis so as to enable it to renew the precooked foods operations. Said determination provided that Patman could compete only if it was able to pay wage rates for each classification somewhere between the median and top rate paid by the competitors. While Patman could provide a fringe benefit program containing the best and most generous benefits offered by any of said competitors, said program could not include any items which were excluded from their contracts [Tr. 295 to 296].

On the evening of June 2, Petitioner's representatives met with 21 of the laid-off employees. One representative told the employees that Patman, because of competition, was desirous of operating at the rates which had been submitted to the Union that day. He told them that, if Patman could not meet the competition, it would have to close the precooked foods department. *Cook further told them that they already had an existing contract.* When the matter was put to

a vote, the employees voted against accepting Patman's proposal [Tr. 35:9 to 38:13].

On June 3, Patman's counsel spoke with counsel for Petitioner and explained Patman's problem and the employees' rejection of Patman's proposal. On that day and thereafter for a couple of weeks, they discussed various courses that the parties might take to solve Patman's problem, without which, it was believed, Patman could not reopen its precooked foods operation [Tr. 378:21 to 379:6].

Patman's attorney proposed to arbitrate the dispute. This proposal was *initially* accepted by Petitioner's counsel via his assurance to Patman's counsel that he would recommend it to Petitioner [Tr. 306:22-24; 361:5-15]. Thus, when the Executive Secretary of the Meat Jobbers called Patman's attorney to request authority to sign the 1970 sausage industry agreement and thereby ratify it on behalf of Patman, the counsel for Patman, feeling that the dispute over coverage of the precooked food employees would be resolved in arbitration [Tr. 308:23 to 309:5; 359:2-5; 309:6-7], authorized the Secretary to sign the contract. Subsequent to the signing of that contract, Petitioner's attorney retracted his earlier indication of amenability to arbitration, blithely stating that his client had not accepted it [Tr. 311:1-4; 361:22-24].

Believing that the precooked foods employees were not, in fact, covered by the applicable provisions of the sausage industry agreement, Patman's attorney thereupon drafted a letter, dated June 22, and addressed it to the precooked food employees last laid off, telling them that the annual layoff, which began on May 31 would end on June 25, but that, because

Patman was losing money in the operation, it could reopen only with employee wages and benefits which did not cost more than its competitors were paying. The letter continued by setting out the wage and fringe benefits that precooked food employees would receive after June 28. These were the same as those which had been presented to Petitioner on June 2 and had been rejected by the employees that night. The letter also informed the employees that anyone who had worked for Patman before the annual closing would receive the rate provided for employees who had worked for six months regardless of the length of time the addressees had actually worked, with only newly hired employees beginning at the "start" rate. They were informed that if they wished to work in the precooked foods department, they should report for work at 7:30 a.m. on June 28, 1971 [G.C. Ex. #3; Stip. Tr. 15:4-7, Stip. Tr. 8:9-17].

On June 28, approximately 17 of the 19 recalled employees returned to work. The remaining two vacancies were filled by calling the next seniormost employees. The wages, economic benefits and other conditions of employment outlined in the June 22 letter were instituted and were continued thereafter. They were still in effect at the date of the hearing.

In addition to arbitration, both parties explored still another method for resolving their mutual dilemma. Specifically, counsel for Petitioner suggested that he would file a charge of violation of Section 8(a)(5) and, if the Regional Director should find that there was no applicable contract and should therefore refuse to issue a complaint, he would accept this decision without appeal, and would then be able to tell Pe-

titioner there was no applicable contract [Tr. 383:5-18].

On June 24, 1971, the charge leading to the instant action was filed and investigated, alleging, *inter alia*, that said implementation of the final offer on June 28 constituted an unlawful withdrawal of recognition of the Union, and a refusal to bargain, in violation of Patman's duties under Section 8(a)(5) of the Act. However, notwithstanding the mutual intent of the parties to have this be an orchestrated case, a complaint was ironically issued.

The Board's Findings and Conclusions.

The Board found from the foregoing evidence that the dispute was arguably one of whether the contract covers the precooked food department employees, and thus properly one for deferral within the meaning of *Collyer Insulated Wire*, 192 NLRB No. 150 (1971). The Board deferred to arbitration and dismissed the complaint, retaining jurisdiction to determine whether the final arbitration award was fair and regular and not repugnant to the purposes of the Act. 197 NLRB No. 150.

ARGUMENT.

Since the opinion of the Court of Appeals is correct and there is no conflict in the circuits, there is no occasion for further review.

1. Petitioner fails to establish that the Board abused its discretion in deferring to the arbitral processes which the parties consensually established. Clearly, the Board is empowered with "considerable discretion to . . . decline to exercise its authority . . . if to do so will serve the fundamental aims of the [National Labor Relations] Act." *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964); *International Harvester Co.*, 138 NLRB 923, 925-926 (1962); see *NLRB v. Plasterers' Union, Local 79*, 404 U.S. 116, 136-137 (1971); *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1951); *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 18-19 (1942); *Consolidated Edison Co. v. NLRB*, 305 U.S.197, 222-224 (1938); *Ramsey v. NLRB*, 327 F. 2d 784, 786-787 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964).

The Board's decision to decline to exercise jurisdiction in cases where the arbitral process is potentially available and capable of resolving the dispute is plainly in accord with the intent and wishes of Congress and nurtures a fundamental policy of the Act favoring the voluntary settlement of disputes. See *Gateway Coal Co. v. United Mine Workers of America*, ... U.S. ....., 38 L. Ed. 583, 592 (1974); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1961); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 252 (1970). Section 1 of the Act specifically

underscores the importance of "encouraging practices fundamental to the friendly adjustment of industrial disputes. . . ." In addition, Section 203(d) of the Act states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settling grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

See also Section 101 of the Labor Management Relations Act (29 U.S.C. § 151).

The policy of the Board to defer to an agreed upon arbitration process was initially expressed in *Spielberg Mfg. Co.*, 122 NLRB 1080 (1955). There, the Board declined to consider the merits of an employer's Section 8(a)(3) discrimination charge, and deferred to the arbitrator's award, finding:

> "[T]he proceedings appear to have been *fair and regular, all parties have agreed to be bound,* and the decision of the arbitration panel is *not clearly repugnant to the purposes and policies of the Act.* In these circumstances, we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id.* at 1082 (emphasis added).

In *Collyer Insulated Wire Co.*, 192 NLRB No. 150, 77 LRRM 1931 (1971), the Board logically extended its sound reasoning in *Spielberg* to situations where arbitration had not yet been resorted to, and held that where a dispute is one over the terms and meaning of the contract, in addition to involving an alleged unfair labor practice, it should be resolved pursuant to the

arbitration provisions of the contract. Factually, *Collyer* involved a company (Collyer) and a Union with a bargaining history and labor relations rapport for a period of thirty-five years. Two months after executing a collective bargaining agreement with provisions designating arbitration as the exclusive remedy for resolving contract disputes, Collyer unilaterally insituted wage raises and changed working assignments for its skilled maintenance mechanics and electricians. Collyer based its actions on the language of certain provisions in the contract; the Union objected, contending that the disputed provisions precluded any such raises. Thereafter, the Union filed a complaint with the NLRB, alleging violations of Sections 8(a)(1) and (5) of the Act. The Board dismissed the complaint, finding that (1) the parties' long and productive collective bargaining relationship, (2) the company's willingness to proceed to arbitration, and (3) the fact that the dispute involved an issue of contract interpretation, evidenced that the policies of the Act would best be accommodated by deferring to arbitration. The Board retained jurisdiction, however, to determine whether the final arbitration award was fair and regular and not repugnant to the purposes of the Act.

The propriety of requiring the parties to resort initially to their own consensually adopted processes cannot be doubted; the soundness of such a requirement is patently underscored in the instant case where it is clear that all parties recognized and acknowledged the applicable arbitration process, but resorted to filing a charge only as a means to allay discontent among the employees and to thereby sculpture an orchestrated case [Tr. 383:5-18].

Petitioner nevertheless seeks to undermine the fundamental soundness of the *Collyer* rule by characterizing it as an abdication by the Board of its express and exclusive authority.[1] Such a bold assertion is belied not only by the manifest language and intendment of the Act, but also by the very rule prescribed in *Collyer*.[2]

Petitioner also inappropriately calls upon Section 10 (a) of the Labor Management Relations Act as requiring the Board to exercise its jurisdiction in all cases, and proscribing the Board from deferring to the parties' adopted arbitration procedures. However, Section 10 (a) merely provides, in pertinent part, that:

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[1]Such a position was soundly rejected by the court of appeals in *Associated Press v. N.L.R.B.*, 492 F. 2d 662 (D.C. Cir. 1974). There, the Court noted:

> "The Board does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques as long as it is assured that those techniques are procedurally fair and that the resolution is not clearly inconsistent with or repugnant to the statute." *Id.* at 667.

[2]Petitioner's citation of *Templeton v. Dixie Color Printing Co.*, 441 F. 2d 1064 (5th Cir. 1971) and *Surratt v. NLRB*, 80 LRRM 2804 (5th Cir. 1972), in support of its foregoing characterization, is erroneous. These decisions are plainly inapposite to the instant proceeding in that they involved the arbitrary action of the Board, under the guise of its "blocking charge practice", of refusing to hear an *employee's* decertification petition against a Union, while that same Union had pending certain unfair labor practice charges against the employer. The Courts relied strongly on the specific and mandatory language of § 9(c)(1) (the Board "*shall* provide. . . . [and] *shall* direct an election"), and on the compelling and unique circumstances of the particular cases whereunder Unions with obviously less than majority support were permitted to capriciously stall decertification elections. Further, the Courts noted that under "normal" circumstances the Board may properly invoke the blocking charge rule, despite the specific and mandatory language of Section 9. There should be no doubt, therefore. that in light of the more permissive language of § 10 (a), the Board may in its discretion defer its jurisdiction to the voluntary processes of the parties.

> "[t]he Board is *empowered* as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." (Emphasis added).

In no fashion may this general grant of authority be construed, as Petitioner contends, to *require* the Board to exercise jurisdiction in all instances. Rather, as expressly held by the Ninth Circuit Court of Appeals, Section 10(a) merely *empowers* and does not *direct* the Board to exercise its jurisdiction. *Haleston Drug Stores v. NLRB*, 187 F. 2d 418, 421 (9th Cir. 1951). See also *NLRB v. Olaa Sugar Co.*, 242 F. 2d 714, 719 (9th Cir. 1957).

Because the Board here has, pursuant to its *Collyer* doctrine, properly retained jurisdiction to police the arbitration award in the event a proper showing is made that the arbitration procedure has not been fair and regular or that the result is repugnant to the Act (197 NLRB No. 150, at 4), it certainly has not abused the discretion with which it is empowered to further the fundamental policies of the Act.[3]

2. There is absolutely no conflict in the circuits concerning the propriety of the *Collyer* doctrine. The First, Second, and District of Columbia Circuits, as well as the Ninth Circuit in this instant dispute, have catholically affirmed the soundness of the *Collyer* doc-

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[3]An "abuse of discretion" must, at minimum, entail some arbitrary and capricious action which is unjustifiable under the circumstances. See *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.* 285 F. 2d 8, 11 (6th Cir. 1960).

trine, and have accordingly sanctioned the Board's exercise of discretion thereunder. *E.g., Provision House Workers Union Local 274 v. NLRB*, 493 F. 2d 1249 (9th Cir. 1974); *Enterprise Publishing Co. v. NLRB*, 493 F. 2d 1024 (1st Cir. 1974); *Associated Press v. NLRB*, 492 F. 2d 662 (D.C. Cir. 1974); *IBEW, Local 2188 v. NLRB*, ... F. 2d ....., 85 LRRM 2576 (D.C. Cir. 1974); *Nabisco, Inc. v. NLRB*, 479 F. 2d 770 (2d Cir. 1973); see *NLRB v. Chase Manufacturing Co.*, 492 F. 2d 1300 (7th Cir. 1974).

And contrary to Petitioner's bald assertion (Pet. 14), *NLRB v. Chase Manufacturing Co., supra,* is wholly inapposite to the instant dispute, in that the Board's refusal to exercise its discretion to defer, which was upheld by the court, rested upon:

> "an unlawful course of conduct whereby Respondent [employer] intended to rid itself of the established bargaining relationships and its attendant obligations of which the contract wage rates were but a part". (492 F. 2d at 1301).

In fact, *Chase Manufacturing* is actually supportive of the Court of Appeals' decision herein, and of the propriety of the *Collyer* doctrine, in that it plainly evidences the Board's refusal to defer to arbitration where to do so would be clearly repugnant to the fundamental policies of the Act.[4]

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[4]See also *Ryder Technical Institute*, 199 NLRB No. 85, 81 LRRM 1296 (1972), wherein the Board refused to follow an arbitration award which upheld an employer's unilateral discontinuance of customary bonuses. The Board noted:

> "[W]e agree with the Trial Examiner, on the basis of the test laid down in Spielberg Manufacturing Company . . . and recently reiterated in Collyer Insulated Wire . . . that the Board is not bound by the arbitrator's award which was 'clearly repugnant to the purposes and policies of the Act.'" *Id.*, 81 LRRM at 1298 (footnote and citations omitted).

3. The Court of Appeals' decision is correct since the instant dispute is particularly appropriate for deferral to the arbitration process. In *Collyer Insulated Wire,* the Board indicated that the propriety of deferring to arbitration in future disputes should be gauged by the following general queries: (1) Does the particular dispute arise within the confines of a long and productive collective bargaining relationship; (2) Was the employer's action initiated in good faith and with no design to undermine the Union; (3) Has the employer asserted its willingness to resort to arbitration; and (4) Is the dispute one of substantive contractual interpretation and eminently well suited to resolution by arbitration? *Id.,* 77 LRRM 1936.

This instant dispute provides an affirmative answer to each of these queries and is thus manifestly appropriate for deferral. The parties before this Court have had a successful and fruitful bargaining history and rapport for a period exceeding 35 years [Tr. 230:18-19; 233:19-20; 277:10]. The numerous attempts by Patman to arrive at an amicable resolution [Tr. 42:22 to 44:16; 56:14-19; 144:9 to 145:17; 44:9-25; 103:19 to 104:12; 286:1-14; 22:2 to 26:2; 105:1 to 106:13; Trial Examiner's Decision, 5:9-17], when coupled with the mutual intent of the parties to produce an orchestrated case [Tr. 383:6-18], manifests that the parties are clearly asserting their polar claims herein in good faith, and that the dispute is wholly devoid of unlawful conduct or aggravated circumstances. The parties have agreed upon a well defined grievance arbitration procedure, which Patman has urged Petitioner to use for resolving this dispute [Tr. 306:22-24; 361:5-15]. And this dispute involves a classical problem of substantive

contract interpretation, falling thereby within the bounds of the arbitration provisions.

Petitioner nevertheless seeks to becloud the otherwise patent arbitrable nature of this dispute by characterizing it as one involving issues of representation and appropriate bargaining unit. Petitioner asserts that because the Board framed the instant dispute as "one of whether the contract covers the precooked food department employees, and not one of wages", it must be concluded that the issue is whether Petitioner even represents the group in question.

However, no one disputes that the employees in question are a part of the bargaining unit, covered by the contract and represented by Petitioner [R. 11; G.C. Ex. #2; Tr. 237-238]. Relief was sought by Petitioner, as representative of the precooked foods employees, for failure to bargain over certain unilateral changes by Intervenor in the benefits and rates to be afforded said employees. There existed no dispute whatsoever over Petitioner's standing or representation of said employees, or whether said employees in themselves constituted an appropriate bargaining unit. The sole posture of the case as presented to the Board was whether the contract with Petitioner encompassed the precooked food employees and, if so, whether Intervenor was obligated to bargain with Petitioner over changes in benefits and wage rates. Because resolution of this initial question was eminently well-suited for a seasoned arbitrator, the dispute was deferred thereto.[5]

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[5]Even in the unlikely event that this instant case should in some strained fashion be characterized as one involving an issue of representation or appropriate unit, this would not preclude the Board from exercising discretion and deferring to arbi-

Petitioner alternatively asserts that the controversy is essentially one of hours or wages under Section 5 of the arbitration clause in the sausage industry agreement, and thus inappropriate for arbitration.[6] However, the arbitrator is not being asked to establish wages and hours for these employees. Rather, the question posed is one of contract interpretation: do the employees fit into the job classifications set forth in the contract, thereby being entitled to the wages prescribed by those classifications, or must their wages be negotiated, pursuant to Article IV, paragraph 12 of the contract? Since questions of interpretation of the contract are arbitrable under the contract, the Board has only ordered the parties to do what they have already agreed to do.

Moreover, arbitration clauses should be afforded the broadest and most encompassing interpretation available. This axiom was pertinently emphasized by this Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-584 (1963):

> "An order to arbitrate the particular grievance should not be denied unless it may be said with

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tration if, upon subsequent review, the arbitration award properly considered such an issue. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270 n.7 (1964). Additionally, the Ninth Circuit has pertinentiy held that a dispute such as the instant one, over whether a collective bargaining agreement applies to a certain group of employees, "inherently requires the interpretation and application of the agreement" and is particularly well-suited for arbitration. *Lodge 1327, Int'l Ass'n of Machinists and Aerospace Workers*, 454 F. 2d 88, 92 (9th Cir. 1971), *cert. denied*, 405 U.S. 952 (1972).

[6]Article V, Section 5 provides:

> "No controversy regarding hours or wages shall be subject to arbitration hereunder and the provisions of this article shall not in any way interfere with the right of any party to seek relief at law, in equity, or before any administrative tribunal where a controversy regarding hours or wages exists."

> *positive assurance* that the arbitration clause is not susceptible of an interpretaton that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" (Emphasis added).

Exclusionary clauses of the kind relied upon by Petitioner are uniformly construed to delimit only the arbitration of claims challenging the wage structure *per se,* and do not normally circumscribe disputes concerning the lowering of wages allegedly due to employees. For example, in *Desert Coca-Cola Bottling Co. v. General Sales Drivers, etc.,* 335 F. 2d 198 (9th Cir. 1964), the Court of Appeals expressly held that a contract clause excluding disputes over wages from arbitration was inapplicable in a dispute over the failure to pay overtime wages and noted:

> "The district court broadly interpreted the word 'wages' as commensurate with 'compensation', quoting 92 C.J.S. p. 1035. But the word 'wage' can also be given a narrower definition, commensurate only with the 'wage scale'. Although hours, overtime, and vacations all can affect one's income for tax purposes, the word 'wages' in the contract might well only have been intended to mean the general wage scale. Here, the arbitration clause, paragraph (d) was broad, and the exclusion clause, on its face, uncertain, if not vague. *We cannot hold that the term is 'clear and unambiguous', or say 'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'* " *Id.* at 201 (emphasis added).

In sum, this dispute is arguably, if not definitely, one of contract interpretation and can thus be resolved

by an arbitrator in a manner which will also resolve the unfair labor practice issues consistently with the Act. There is substantial evidence supporting the Board's and the Court of Appeals' determinations in this regard, and this case is thus wholly inappropriate for review by this Court.

Conclusion.

There is no conflict of decisions. The opinion of the Court below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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